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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 239 Misc.

KOKI HIROTA, A CITIZEN AND NATIONAL OF JAPAN, APPEARING BY HIS ~~ATTORNEY AND NEXT FRIEND~~, DAVID F. SMITH,
Petitioner,

v.

GENERAL OF THE ARMY DOUGLAS MacARTHUR, INDIVIDUALLY AND AS GENERAL OF THE ARMY OF THE UNITED STATES IN THE MILITARY OCCUPIED TERRITORY OF JAPAN AND AS SUPREME COMMANDER FOR THE ALLIED POWERS ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS

BRIEF ON BEHALF OF THE PETITIONER, KOKI HIROTA

DAVID F. SMITH,
Counsel for Petitioner Koki Hirota.

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THE MEMORANDUM BRIEF ON BEHALF OF THE PETITIONER, KOKI HIROTA

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1. The Petitioner, KOKI HIROTA, is a former Prime Minister and three times Foreign Minister of Japan. He retired to private life in May, 1938, and had no connection with the Pacific war or anything done in connection with the Japanese prosecution of that war. This honorable Court has indicated that it desires to hear oral argument upon two points:

(1) Whether the Court has jurisdiction to issue the writ of habeas corpus in view of the United States Constitution, Article III, Section 2, Clause 2; and

(2) Whether the allegations of the petition states a case for relief. The argument will take up first the question of jurisdiction.

2. *Jurisdiction.* At the last Term in *Ahrens et al.* v. *Clark, Attorney General,* 335 U. S. 188, a majority of this Court decided that the District Court of the United States had no jurisdiction to issue a Writ of Habeas Corpus unless the prisoner was within the territorial jurisdiction of the particular court and that the jurisdiction did not attach by reason of the fact that the District Court had jurisdiction over his custodian or jailor. Of course, the same line of reasoning applied to the Judges of the Courts of Appeal of the United States. The Petitioner here is a citizen and national of Japan and has been imprisoned at Tokyo, Japan, continuously since December, 1945, by the 8th Army of the United States in the Military Occupied Territory of Japan. The Petitioner not being within the "territorial" jurisdiction of any of the inferior courts of the United States, he has no remedy for the violation of his rights unless a remedy can be found in this Court, either under the "original" or "appellate," or "inherent" power and jurisdiction of this Court. Had it not been for the decision in *Ahrens* v. *Clark, supra,* the petitioner might have filed a petition for Writ of Habeas Corpus in the District Court of the United States for the District of Columbia on the theory that two of the defendants were within the jurisdiction of that court and, in view of the momentous questions presented here, the Solicitor General of the United States would have accepted Service in the District of Columbia on behalf of General MacArthur and Lt. General Walker. Had that course of action been pursued no question would have arisen about the power of review in this Court under its so-called "appellate" jurisdiction. We are now faced with one of the grave questions precipitated by the decision in the

Ahrens case which was so ably pointed out by the three dissenting justices of this Court in that case. In this legal situation, if this Court should reach the conclusion that it has no jurisdiction under its "original" or "appellate" or "inherent" jurisdiction, we then have a truly anomalous condition fraught with all sort of anxiety and apprehension for the future which would require an amendment to the Constitution of the United States in order to cure a tremendous void in the power of the courts to protect rights under the Constitution, laws, etc. If this Court has no jurisdiction to entertain a petition for a writ of habeas corpus, then all aliens and citizens of the United States physically present on foreign soil in military occupied areas deprived and denied their rights and liberty by official action taken by Army officers of the United States in the violation of the Constitution, laws, treaties, and international engagements to which the United States is a party, have no redress in any judicial forum, state or Federal, in the United States; and in that situation officers of the United States could carry on a reign of tyranny and denial of rights without their actions being subject to review anywhere in the United States. Certainly this is not a result to be lightly contemplated or established.

3. It will be our contention that ever since the days of *Marbury* v. *Madison*, 1 Cranch 137, this Court in a long line of decisions has taken an extraordinarily narrow and erroneous position with respect to its "original" and "appellate" and "inherent" jurisdiction under the Constitution and laws of the United States; and if there is no way out of this legal morass created by that line of decisions, it will be necessary to overrule those cases in order to sustain jurisdiction here to issue a writ of habeas corpus under either the "original" or "appellate" or "inherent" jurisdiction.

4. The provisions of the Constitution and laws of the United States pertinent here are:

Article III, Sec. 2 of the Constitution provides:

> "The judicial power shall extend to all cases, in Law and Equity arising under this Constitution, the Laws of the United States, and treaties made, or which shall be made under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party; to Controversies between two or more states;—between a State and Citizens of another state;—between citizens of different States, between citizens of the same States claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign states, Citizens or Subjects.
>
> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Article I, Section 9, Paragraph 2 of the Constitution provides:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U. S. Code, Section 451, provides:

> "Power of courts. The Supreme Court and the district courts shall have power to issue writs of habeas corpus."

28 U. S. Code, Section 452, provides:

> "Power of judges. The several justices of the Supreme Court and the several judges of the circuit courts

of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. * * *"

28 U. S. Code, Section 453, provides:

"When prisoner is in jail. The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

28 U. S. Code, Section 458, provides:

"Body to be produced. The person making the return shall at the same time bring the body of the party before the judge who granted the writ."

28 U. S. Code, Section 461, provides:

"Summary hearing; disposition of party. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

5. In Ex parte Hung Hang, 108 U. S. 552, the court said:

"It has long been settled that ordinarily this court cannot issue a writ of habeas corpus except under its appellate jurisdiction. Ex parte Bollman and Swart-

wout, 4 Cranch 75; Ex parte Watkins, 7 Pet. 568; Ex parte Yerger, 8 Wall. 85; Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U. S. 18; Ex parte Virginia, 100 U. S. 339; Ex parte Siebold, 100 U. S. 371. Section 751 of the Revised Statutes, which re-enacts a similar provision in the judiciary act of 1789 (Sec. 14), gives this court authority to issue the writ, but except in cases affecting ambassadors, other public ministers or consuls and those in which a state is a party, it can only be done for a review of the judicial decision of some inferior officer or court."

6. We contend that the decision in the *Hung Hang* case and the cases referred to therein as well as the line of reasoning which stemmed from *Marbury* v. *Madison*, all proceeded on an erroneous premise and should be overruled by this court if it cannot otherwise rest jurisdiction here to issue the writ. Counsel regrets very much the insufficient time allowed by the court to brief the historical and momentous questions presented by the instant petition. We contend that the provision of the Constitution dealing with the so-called "original" jurisdiction of this court has consistently, since the early days of this court, received an erroneous interpretation. The exclusive jurisdiction of this court to hear cases involving Ambassadors, Ministers, and Consuls and cases to which a state was a party was grounded by the founding fathers on the simple notion that representatives of Foreign Sovereign Governments, and the States of the Union as litigants, were entitled in the first instance to a dignified and supreme forum, for the adjudicatory process, and unlike ordinary litigants, were not to be relegated, because of their special status, to courts of inferior jurisdiction. As is shown by the early state papers, there was no other notion back of the provision for "original" jurisdiction in this court. We contend that while the congress could not take away or impair this "original" jurisdiction, the Congress at all times

had full power to make exceptions to that "original" jurisdiction, as the Congress did purport to do from the early days of the Republic by the grant of power to the justices of this court to issue writs of habeas corpus under the various habeas corpus acts. It is perfectly plain that this court requires the power granted to the justices under the habeas corpus acts, as part of its "original" or "inherent" jurisdiction in order to effectively discharge its high mission as the final interpreter and guardian of the Constitution and laws of the United States. As the whole judicial power of the United States is vested in this court and such "inferior" courts as the Congress might create from time to time and as the judges of the "inferior" courts in those circumstances have been deprived of the power to issue the writs of habeas corpus, what reason is there to suppose the founding fathers intended this high court to have a power in that respect inferior to the power possessed by "inferior" courts; and this contention is all the more emphasized because it has been universally recognized since time immemorial, that the writ is the great bulwark of freedom and serves a specific purpose not found in any other extraordinary process known to the law. While this court might strike down any Congressional attempt at reduction or elimination of "original" jurisdiction, it has no power to question an act of Congress which enlarged the "original" jurisdiction so long as the great objectives of the Constitution were unimpaired. We submit that *Marbury* v. *Madison*, and the succession of cases following it, dealing with the "original" and "appellate" jurisdiction of this court were wrongly decided and should now be finally overruled if it becomes necessary to do so in order to sustain jurisdiction and preserve the great writ in full vitality.

7. Concurrently with the erroneous line of reasoning with respect to the "original" jurisdiction, the provision

of the Constitution relating to the "appellate" jurisdiction of this court has been misconstrued in a long line of cases. As is shown by the federalist and other contemporary papers, the founding fathers never intended the word "appellate" appearing in the Constitution to be interpreted in a highly strained or technical sense. Rather they intended the words "appellate" to refer generally to a general supervisory or corrective jurisdiction and power over the official actions of all *persons*, as well as inferior tribunals, exercising power in derogation of the constitution, laws, treaties, and international obligations of the United States; and we believe this argument to be correct without regard to whether a "case" or "controversy" had previously originated in an "inferior" court acting in either a military or judicial capacity. However this may be *Marbury* v. *Madison*, and many later cases, with some variations, overlooked the provision of the constitution relating to the "appellate" jurisdiction, which made the "appellate" power subject to such "Exceptions" as the Congress might see fit to enact. We may ask, What kind of Exceptions? That the "Exceptions" were not to be necessarily "appellate" in character is perfectly plain. The "Exceptions" gave the Congress a vast repository of power. The "Exceptions" empowered the Congress to make *additions* to either the "appellate" or "original" jurisdiction of this court and it purported to do so in the Habeas Corpus Acts. If the power to make "Exceptions" were construed to refer to "Exceptions" in the appellate line or course of action, then the words would be largely redundant and meaningless.

The contemporary papers show that the founding fathers purposely drew this loose formula dealing with "Exceptions" to the "appellate" power because it best suited the purposes of a new nation and left to the Congress discretion and room to cure deficiencies arising out of actual

experience in the workings of the judicial system. The Habeas Corpus Acts since the early days of the Republic, as well as the act granting the justices of this court power to issue the writ of Mandamus which was struck down in Marbury v. Madison, have attempted to remedy those deficiencies of power. It is a matter of no moment whether the "Exceptions" relate to the "appellate" jurisdiction or to the "original" jurisdiction. In either case the "Exceptions" made by the Congress supply the power. Nothing in the Constitution gives the faintest impression that the "Exceptions" made by the Congress must conform to the "appellate" channel or course. We contend that the Habeas Corpus Acts, as now consolidated, are a valid exercise of congressional power derived from the provision of the constitution dealing with "Exceptions" and that those "Exceptions" could relate to either "appellate" or "original" jurisdiction, save and except that the Congress could not infringe upon the existing described "original" jurisdiction, relating to Ambassadors, etc. and in cases involving States. Whether the many "Exceptions" made by the Congress since the beginning of the Republic could be put in one category or the other with respect to "original" or "appellate," it is clear that the Habeas Corpus acts did validly grant indispensable power to this court to hear the present petition for a writ of habeas corpus in the peculiar circumstances of this case where the petitioner is not within the "territorial jurisdiction" of any of the inferior courts. The Congress must have had the precise situation in mind which now confronts this court when it granted power to the justices of this court to issue the writ.

8. The great injunction of the Constitution that the writ of Habeas Corpus shall not be suspended except under stated conditions is now in jeopardy because the "inferior" courts under the ruling in the *Ahrens* case, supra, have

no power to act because of territorial considerations. Could the founding fathers ever have contemplated a legal situation in the judicial system of the United States where no federal court had the power to act and preserve that great bulwark of freedom? We submit that the answer is obvious. The Habeas Corpus Acts granted power to this tribunal to act. What reason appears to deny that power when the result of a denial would be to leave great and inalienable rights unprotected in any federal forum? We submit that, aside from the "original" and "appellate" jurisdiction of this court, it has inherent power as the final interpretor and "watch dog" of the Constitution and laws of the United States to issue the writ in order to maintain the supremacy of that Constitution and those laws. Surely the founding fathers never contemplated a situation resulting in a stalemate and inaction because there was no forum for relief. Past decisions of this court with more or less regularity, have persisted in reading its "original" and "appellate" jurisdiction in weazel fashion. Hindsight suggests that line of cases were devoid of real imagination with respect to the intention of the founding fathers in their grant of power to both this court and the Congress and the great purposes of the Constitution. The great injunction that the writ should not be suspended could not be enforced except by judicial action. *Ex parte Yerger*, 8 Wall. (75 U. S.) 85.

9. Our contentions with respect to the power vested in this tribunal under its "original", "appellate" and "inherent" jurisdiction finds support in the federalist (Hamilton, Madison and Jay), where pages 373-376 it is stated:

> "Let us now examine, in what manner the judicial authority is to be distributed between the Supreme and the inferior courts of the union. The supreme court is to be invested with original jurisdiction only

'in cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party.' Public Ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judiciary of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.

"Let us resume the train of our observations. We have seen, that the original jurisdiction of the supreme court would be confined to two classes of cases, and those of a nature rarely to occur. In all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the supreme court would have nothing more than an appellate jurisdiction 'with such *exceptions* and under such *regulations*, as the Congress shall make.' The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact. Some well intentioned men in this state, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury in favor of the civil mode of trial, which prevails in our courts of admiralty, probates, and chancery. A technical sense has been affixed to the term "appellate", which, in our law parlance, is commonly used in reference to appeals in the course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New England. * * * The word "appellate" therefore, will not be understood in the same sense in New

England as in New York, which shows the impropriety of a technical interpretation derived from the jurisprudence of a particular state. The expression taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision; in a new government it must depend on the latter. * * *"

"To avoid all inconveniences, it will be safest to declare generally, that the supreme court shall possess appellate jurisdiction, shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security."

10. The second section of the third article of the Constitution gives this court appellate jurisdiction in all cases in law and equity arising under the Constitution and laws of the United States (except in cases in which it has original jurisdiction) with such exceptions, and under such regulations, as the Congress shall make. The term "appellate" jurisdiction must be taken in its largest sense and to imply in its nature the power to superintend and correct the official acts of citizens of the United States which contravene the Constitution, laws, etc. Habeas Corpus, like the other great and extraordinary writs of quo warranto, prohibition, certiorari are supervisory and corrective in their nature. They are also "appellate" in character and clearly within the "appellate" jurisdiction referred to in the Constitution. See 3 Bl. Com. 402. The Habeas Corpus Acts could be regarded as additions to either the "original" or "appellate" jurisdiction of this court, and having been enacted pursuant to the power in Congress to make "Exceptions" are valid.

It is a settled and invariable principle, that every right, when denied, must have a remedy and every injury its

proper redress. 3 Bl. Com. 109. If the inferior courts of the United States have no power to act in the circumstances of this case, then the remedy must be in this court.

11. The writ of Habeas Corpus is the remedy which the law gives for the enforcement of personal liberty. That judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. *Ex parte Tom Tong*, 108 U. S. 556. It is the usual remedy for unlawful imprisonment *Chin Yow* v. *U. S.*, 208 U. S. 8, and is a collateral attack of a civil nature to impeach the validity of a judgment and sentence of another court, either civil or military. *In re Frederich*, 149 U. S. 70.

12. Habeas Corpus proceedings have been entertained when both the custodian and his prisoner are outside the territorial jurisdiction of the court. *Ex parte Yee Hick Ho*, 33 F. (2d) 360; *U. S.* v. *Day*, 50 F. (2d) 816; *James* v. *Biddle*, 131 F. (2d) 853; *U. S.* v. *Schlotfeldt*, 136 F. (2d) 935.

13. We also contend that during the existence of a state of war between the United States and Japan the Constitution of the United States follows the flag into the military occupied territory of Japan, and that the process and writ of this court can reach unlawful action by officers of the United States Army in contravention of the Constitution and laws, etc. of the United States.

14. It would be truly catastrophic for this court to announce that nowhere in the Federal system can the writ of Habeas Corpus issue when the prisoner is not within the territorial jurisdiction of the United States. If, in order to avoid passing upon the large questions raised here, this court is minded to overrule *Ahren* v. *Clark*, *supra*, then petitioner requests a reasonable opportunity to file a petition for the writ in the District Court of the United States for the

District of Columbia. As that court would probably refuse a decision on the momentous questions presented by the petition here, the case could be brought quickly to this court and in that situation this Court would, under the decisions as they stand now have undoubted "appellate" jurisdiction.

15: *Whether the petition states a case for relief.* At the outset it should be pointed out that the petitioner is not asking this court to review the decision of an international court, although an American judge sat on the International Military Tribunal for the Far East and purported to exercise authority on behalf of the United States. Indeed, it is hard to describe the International Military Tribunal for the Far East as an "international" tribunal. It might more properly be described as a tribunal of the allied powers in the war against Japan notwithstanding the fact that a number of nations who declared war upon Japan, such as Brazil, Peru, Colombia, and Mexico were never invited to send a judge to participate in the deliberations of that tribunal. All the questions petitioner raises here with respect to violation of rights under the Constitution, laws, treaties and international engagements of the United States, such as the Japanese Instrument of Surrender signed on September 2, 1945, deal solely with official actions taken by General MacArthur as citizen and army officer of the United States. General MacArthur created the International Military Tribunal for the Far East by the issuance of the special proclamation and charter fully described in the petition. He gave the tribunal no final authority to carry out its judgment and sentence. The charter rendered the tribunal purely a fact finding advisory organ to General MacArthur acting in his capacity as Supreme Commander for the Allied Powers. The charter provided with respect to the judgment of said tribunal that it would be "transmitted directly to the Supreme Commander for the Allied Powers for his

action," and that sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence, except to increase its severity." In other words the judgment of the tribunal had no finality; it was not self-executing; and it could not have any validity or effect until such time as it was approved by General MacArthur. We repeat again that we bring into question in the instant petition only unlawful action taken by General MacArthur as a citizen of the United States and the Commanding General of the Armed Forces of the United States in the Pacific Theatre. In the charter for the establishment of the tribunal General MacArthur defined certain alleged crimes without authority of law which were called "crimes against peace," "crimes against humanity," and conspiracy to commit crimes against peace and humanity. In that charter he also permitted the tribunal to consider "conventional war crimes" which had always been theretofore triable in national military courts or commissions. The petition raises grave questions with respect to unlawful action taken by General MacArthur in violation of a number of provisions of the Constitution of the United States. The petition also raises questions with respect to the interpretation of the Japanese Instrument of Surrender to which the United States was a party. The latter point deals with the contention that petitioner was convicted solely for actions and omissions which occurred prior to May, 1938, and had no connection with the Pacific War proper which began on December 7, 1941. The Japanese Instrument of Surrender related solely to a surrender with respect to the Pacific war proper and was so understood and intended by the Japanese Government and all of the Allied Powers at the time of the surrender. This involves the proper construction of an international compact or international engagement of the

United States, and in our opinion is entitled to construction in the same manner as is a treaty of the United States. As the petitioner was convicted solely for acts and omissions occurring while he occupied the high office of Prime Minister and Foreign Minister, questions are raised under the law of Nations whether the head or quasi-head of a foreign government domiciled on foreign soil is triable for alleged war crimes as an individual and whether he is entitled to the "exemption" from detention by an officer of the United States under 28 U. S. C., sec. 453, which provides for review in the United States when this prisoner "is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations."

16. Serious questions are raised with respect to the procedure and practice directed to be followed by the tribunal in the charter. Our position is that the procedure and practice having been authorized by General MacArthur and subsequently affirmed by him, the acts of the tribunal in the course of the trial were adopted by General MacArthur as his acts.

17. Additional grounds in support of jurisdiction here appear in paragraph 19 of the petition. These are repeated in summary form for the more ready understanding of the court:

Petitioner alleges that General of the Army Douglas MacArthur, as a citizen of the United States, acting either in his capacity as a General of the Army of the United States or as Supreme Commander for the Allied Powers, had no authority at any time from the Congress or the President of the United States to create the International Military Tribunal for the Far East or to issue a special

charter for the government and procedure of said Tribunal; and his action in that respect has never been ratified; that nothing contained in the Potsdam Declaration or the Japanese instrument of surrender of September 2, 1945, or anything done by way of "implementation" of the Japanese instrument of surrender, furnished any lawful basis for the creation of an International Military Tribunal for the trial of "crimes against peace," "crimes against humanity," and "conspiracy to commit crimes against peace and against humanity"; or for the trial of "conventional war crimes in violation of the customs and usage of war" in any court other than a national court or commission.

General of the Army Douglas MacArthur has not heretofore been authorized by any law enacted by the Congress of the United States of America or any provision of its Constitution to establish a Military Tribunal for the trial of war criminals other than an American Military Tribunal or commission; nor has the Congress of the United States of America authorized him to appoint American or Philippine civilian or military judges to an International Military Court or to associate or pool or commingle American interests and powers in such a Tribunal; nor has the Congress of the United States ever authorized or empowered him to accept an appointment or office or place of trust from sovereign foreign nations for the purpose of establishing an International Military Tribunal or to appoint either civilian or military judges of those foreign nations to such Tribunal; that the powers resting in General of the Army Douglas MacArthur, as Supreme Commander for the Allied Powers, are confined to the Military Occupation of Japan, the coordination of such operations, maintenance of the security of the occupation, including the power to appoint only an American Military Tribunal or commission for the trial of conventional war crimes, as the same have been heretofore defined in the customs and

usages of war and in the Articles of War enacted by the Congress of the United States.

The action of General of the Army Douglas MacArthur, in accepting an office, title and place of trust from ten (10) foreign governments without consent of the Congress of the United States of America for this purpose, and undertaking to appoint civil and military judges to sit in an International Military Tribunal to represent such foreign governments and the United States, and his reservation of sole right to review, approve, reverse or modify the final decision of such Tribunal on behalf of eleven governments, which decision of the Tribunal was purely advisory, was and is in violation of Article 1, Section 9, Clause 8 of the Constitution of the United States of America which reads in part: "And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office or Title, of any kind whatever, from any King, Prince or foreign State," and of Article 1, Section 8, Clause 14 of the Constitution of the United States of America which provides that the Congress has the sole power "to make Rules for the Government and Regulation of the land and naval forces." The amended charter of April 26, 1946, is repugnant to and in violation of Arficle 1, Section 9, Clause 3, of the Constitution of the United States of America which provides that "No Bill of Attainder or ex post facto law shall be passed;" that the body of law specially stated in the charter for the International Military Tribunal for the Far East defined a novel and nonexistent body of the law of nations as it relates to "crimes against peace," "crimes against humanity," and conspiracy to commit such alleged crimes and, being ex post facto, were, by the same token, rendered acts of attainder against the Petitioner; and in that the provision for the trial of "conventional war crimes" at the international

level, rather than in national courts as practiced since time immemorial, changed the rules, standards and forum after the commission of acts and omission for which the Petitioner was convicted and constituted ex post facto action; that the issuance of such special charter was repugnant to and in violation of Article 1, Section 8, Clause 10 of the Constitution of the United States of America which provides that the Congress shall have sole power "to define and punish * * * offenses against the laws of nations," in that the Congress of the United States has never at any time defined any such body of law; nor has the "law" stated in the charter been otherwise recognized by the legislative, executive or judicial authority of th United States of America to be either national law or the law of nations; that the statement of such alleged body of law set forth in the special charter is repugnant to and in violation of the Fifth Amendment to the Constitution of the United States of America which provides in part; "No person * * * shall * * * be deprived of life, liberty, or property, without due process of law; * * *," in that the statement of such a novel body of law, having no previous existence or recognition at either the national or international level by the United States or in other civilized nations, deprived this Petitioner in circumstances of this case of life and liberty without due process of law under authority and color of an act performed by a citizen and a military officer of the United States; that the action of General of the Army Douglas MacArthur, in stating such novel body of law in the special charter, constituted the exercise of legislative power not derived from the Constitution or laws of the United States of America or the laws of any foreign country represented on such Tribunal; and further neither the Potsdam Declaration nor the Japanese instrument of surrender created or established any new law, nor did said instruments authorize the crea-

tion or the establishment of any new law, national or international, for the trial of war criminals or the procedure to which Petitioner was subjected.

General of the Army Douglas MacArthur, in making and promulgating the amended charter of April 26, 1946 for the establishment, government and procedure of the Tribunal, so limited and circumscribed the functions and powers of the Tribunal and so altered, revised and abrogated the basic, essential and fundamental rules of evidence, procedure and trial as heretofore applied by National Military Tribunals and commissions and courts of criminal justice in all civilized nations, including the United States of America, that said amended charter itself deprived the Tribunal of all opportunity and power to accord this Petitioner a fair and impartial trial in accordance with basic, accepted and minimal standards of justice of all civilized nations; and this action is repugnant to and in violation of the 5th and 6th Amendments of the Constitution of the United States of America which provide in part, "No person * * * shall be deprived of life, liberty, or property, without due process of law; * * *," and "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses in his favor, and to have the assistance of counsel for his defense." Said Tribunal in pursuance of the unprecedented procedure set forth in the charter received in evidence against this Petitioner, over objection and the exception of this Petitioner, hundreds of documents consisting of *ex parte* affidavits, unsigned and unsworn statements, diary entries, newspaper reports, unofficial documents, hearsay statements of the second and third degree secondary evidence of the contents of the documents, unidentified reports, long prosecution summaries of its version of the contents of innumerable affidavits, reports, etc. which were not themselves introduced in evidence and which summary was ac-

cepted by the Tribunal as an exhibit in the trial; and the Tribunal thus deprived the Petitioner of the ordinary right of cross-examination and elementary justice; in pursuance of said special charter the Tribunal refused to call as witnesses at the request of the Petitioner the persons whose *ex parte* affidavits were admitted into evidence over his objection and exception; and the Tribunal on innumerable occasions refused to call witnesses at the request of the Petitioner who were reasonably expected to give testimony relevant and material to the defense of this Petitioner; and in pursuance of the special and relaxed provisions of said charter the Tribunal required the Defendants to submit a higher standard of proof than was required of the Prosecution throughout the 8 months it took for presentation of its case; and otherwise the proceedings and rulings of said Tribunal on hundreds of occasions, mostly by majority vote, throughout the trial were contrary to the practice and procedure of national military courts and criminal courts, and by reason thereof the findings and judgment of said Tribunal were vitiated.

The basic actions of said Tribunal prejudicial to this Petitioner were further emphasized and facilitated by provisions of the special charter as follows:

Article 4(c) which provided that a judge of the Tribunal may function in absentia and as several of the judges absented themselves for considerable periods of time during the course of the trial, this Petitioner was deprived of the right to have such judges see and hear the witnesses for and against him and an opportunity to appraise their credibility; Article 5(a) to (e), all inclusive, purported to define without authority of law, *ex post facto*, what constitutes alleged war crimes and violation of the laws and customs of war, thus depriving the Tribunal of all opportunity to judge and ascertain in its own right the status, meaning and condition of the laws of war as applied by the

various nations of the world and by the nations represented on the Tribunal; Article 6 which permitted the Tribunal, as it did in fact, to strip this Petitioner of the right to defend on the ground that he acted or omitted to act by virtue of an order of the Japanese Government or of a superior; Article 13(a) which provided without authority of law that the technical rules of evidence (as heretofore applied by military tribunals, commissions and criminal courts) shall not be binding on the Tribunal and that the Tribunal may apply an unknown standard and rule of evidence of its own making, limited only by the views of the majority of the Tribunal as to what constituted "probative value"; Article 13(c)(1) to (5), all inclusive, which provided generally for the admission of evidence against this Petitioner by the Tribunal on innumerable occasions of hearsay and *ex parte* statements, reports, affidavits and depositions, thereby depriving the Petitioner of the ordinary right established since time immemorial to be confronted in military and criminal trials by the witnesses against him and to be afforded an opportunity to cross-examine any witness against him; and Article 13(a) which provides that the Tribunal may take judicial notice of various described matters, which it did on innumerable occasions, dealing with subjects never heretofore considered by any military or judicial Tribunal as falling within the doctrine of judicial notice.

The trial conducted by such Tribunal, pursuant to the special charter, was prejudicial to your Petitioner in that the Tribunal in applying the charter rule of "probative value" summarily rejected by majority vote hundreds upon hundreds of material and relevant documents indispensable to the defense of this Petitioner upon the charges contained in the indictment and upon which he was convicted.

18. The foregoing points show that the entire action taken by General MacArthur against the Petitioner was

without any authority from the Congress or the President of the United States. That ground alone would invoke jurisdiction here. But, as previously shown it is also claimed that the petitioner was unlawfully deprived of his liberty in violation of many sections of the Constitution. We, therefore, respectfully ask this honorable court to allow the petition for the Writ of Habeas Corpus to be filed and prosecuted.

All of which is most respectfully submitted.

DAVID F. SMITH,
Attorney for Petitioner,
KOKI HIROTA.

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